Supreme Court, U.S.
FILED
MAY 28 1993

No. 92-1749

In The

Supreme Court of the United States

October Term, 1992

THOMAS F. ICARD, JR., as Trustee,
and FAY ICARD HUSKINS,
as Trustee designate, et al.,

Petitioners,

vs.

SARASOTA-MANATEE AIRPORT AUTHORITY, etc.,

Respondent.

On Petition For A Writ Of Certiorari To The District Court of Appeal of Florida, Second District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court has jurisdiction when the only issue addressed in the state court proceedings involved a state law taking claim under Article X, Section 6, of the Florida Constitution and thus a federal question or claim was never raised or decided by the state appellate court.

II. Whether a federal question can be raised when the state court decision of which Petitioners seek review by certiorari was merely an affirmance with citation to a previous decision of that same state court which itself solely addressed an issue of state law.

III. Assuming a federal claim was raised and decided by the state appellate court, whether under the test established by this Court in *Loretto v. Teleprompter of Manhattan CATV Corp.* aircraft overflights are temporary physical invasions and not permanent physical occupations thereby requiring proof of diminution in value to the property in order to prove a taking.

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Respondent, Sarasota-Manatee Airport Authority, respectfully prays that the Court deny the Petition for Writ of Certiorari to review the decision of the District Court of Appeal of Florida, Second District.

III. STATEMENT OF CASE

Petitioners' statement of case, although essentially accurate, fails to adequately review the procedural aspects of this case which serve to demonstrate that this

Court is without jurisdiction to review the state appellate court decision. In 1984, Petitioners filed a complaint in the state circuit court in Manatee County, Florida seeking compensation in inverse condemnation from the governing body of the Sarasota-Bradenton Airport, the Sarasota-Manatee Airport Authority (SMAA). Petitioners' complaint, which is included as Appendix "A" to this brief, sought relief under Article X, Section 6 of the Florida Constitution and made no mention of the Fifth or Fourteenth Amendments to the United States Constitution. During this same time period, a group of over 100 landowners living in the vicinity of the airport filed a similar lawsuit, styled *Fields v. Sarasota-Manatee Airport Authority*, based on the same theories as brought by Petitioners and who, not coincidently, were represented by the same attorneys who initially filed the complaint in this case.

The *Fields* case ultimately went to trial in December of 1985 and the trial court entered a final judgment on January 28, 1986 denying the *Fields* plaintiffs their requested relief. The *Fields* plaintiffs subsequently appealed the final judgment to the Florida Second District Court of Appeals. While the *Fields* appeal was pending, Petitioners entered into a joint motion for abatement of this proceeding until all appeals in *Fields* were resolved and for which the trial court entered an order of abatement. The Second District eventually rendered a decision affirming the trial court's final judgment, holding that under the Florida Constitution and Florida case law, the *Fields* plaintiffs were not entitled to compensation for inverse condemnation. The Florida Supreme Court then denied discretionary review of the Second District's decision. *Fields v. Sarasota-Manatee Airport Authority*, 512 So.

2d 961 (Fla. 2d DCA 1987), rev. denied, 520 So. 2d 584 (Fla. 1988).

A majority of the *Fields* plaintiffs then filed suit in the United States District Court, Middle District of Florida, once again alleging that SMAA had failed to pay for avigational easements over their properties and that they were entitled to relief under 42 U.S.C. § 1983 and the Fifth Amendment to the United States Constitution. On January 14, 1991, the district court granted SMAA's motion for summary judgment holding that pursuant to Florida law on *res judicata* the *Fields* plaintiffs' federal law claims were barred because of the prior state court action. On appeal, the Eleventh Circuit Court of Appeals, affirmed the district court's entry of summary judgment although on different grounds than those proffered by the district court in its opinion. *Fields v. Sarasota-Manatee Airport Authority*, 755 F.Supp. 377 (M.D. Fla. 1991), *aff'd*, 953 F.2d 1299 (11th Cir. 1992).

During the pendency of the *Fields* federal lawsuit, Petitioners revived their lawsuit and filed a motion for summary judgment claiming that a finding of market value damages was not necessary in order to conclude that a taking had occurred. Therefore, according to Petitioners, the acknowledged dispute as to market value damage did not preclude summary judgment. The trial court agreed with Petitioners' argument and granted partial summary judgment as to the issue of liability for a taking. Respondent appealed the partial summary judgment to the Second District Court of Appeal. The Second District reversed the trial court's partial summary judgment holding that under its previous decision in *Fields* the factual dispute as to market value impact precluded

summary judgment. Petitioners proceeded to seek discretionary review of that decision by the Florida Supreme Court, which review was denied. *Fields v. Sarasota-Manatee Airport Authority*, 512 So. 2d 961 (Fla. 2d DCA 1987), *rev. denied*, 520 So. 2d 584 (Fla. 1988). No further appeals of that decision were taken.

Rather, Petitioners, upon remand to the trial court, proceeded to trial. After hearing two days of testimony concerning market value impact, the trial court entered a final judgment on July 25, 1991, finding that Petitioners had failed to sustain the burden of proving substantial market value damage and, therefore, denying Petitioners' relief. Petitioners, after the trial court denied their motion for rehearing, appealed the final judgment to the Second District Court of Appeal. The appellate court eventually affirmed the final judgment with citation to its previous decision in *Fields*. After Petitioners post-decision motions were denied, Petitioners filed a notice of invoking discretionary review in the Florida Supreme Court. The Florida Supreme Court summarily dismissed the petition finding that as a matter of law there was no basis for review by that court.

Petitioners have now filed a petition for writ of certiorari in this Court seeking review of the per curiam affirmance with citation decision rendered by the District Court of Appeal of Florida, Second District.

IV. SUMMARY OF ARGUMENT

Throughout the course of proceedings in this case in the State of Florida's judicial system, Petitioners raised

one claim and one claim only – a state law claim for inverse condemnation under the Florida Constitution. No federal claim was ever raised by Petitioners in state court and, unsurprisingly, no federal claim was decided by the Florida court. Because no federal claim was presented to or decided by the state courts, this Court should not accept jurisdiction over the case.

Nor can the Florida intermediate appellate court's single word opinion "affirmed," which has no precedential value under Florida law, be fairly said to raise any conflict with federal law. What Petitioners are really asking this court to review are those earlier Florida decisions, interpreting Florida law, upon which the result in this case is based. The time for review of those cases has long passed, however, and the court should not exercise its extraordinary jurisdiction to review the single word state law decision presently before it.

Finally, even if jurisdiction in this court were appropriate, the Petitioners' arguments fail because the decision below comports with this Court's decisions in *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed. 2d 868 (1982). The petition for a writ of certiorari, therefore, should be denied.

V. ARGUMENT: REASONS FOR DENYING WRIT

A. THE DECISION BELOW DOES NOT DECIDE A FEDERAL QUESTION AND, THEREFORE, THIS COURT DOES NOT HAVE JURISDICTION.

In order for this Court to accept jurisdiction on a writ of certiorari of a state court decision, it is well settled that the record must show that a federal question was both raised and decided in the state court. See *Yee v. City of Escondido*, ___ U.S. ___, 112 S.Ct. 1522, 118 L.Ed. 2d 153 (1992); *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed. 2d 398 (1969). Although Petitioners take great pains in highlighting the occasions upon which this Court's decisions concerning takings claims were cited below, the record is devoid of any reference to the assertion of a federal takings claim and, more importantly, the state court decisions are completely lacking of any references to either the Fifth or Fourteenth Amendment of the United States Constitution. Accordingly, it is abundantly clear that no federal question was presented to or addressed by the state courts in this case. The Court, therefore, has no basis upon which to accept jurisdiction and the Petition for Writ of Certiorari should be denied for that reason.

A review of Petitioners' complaint shows that the only issue raised in the Florida court was an inverse condemnation claim brought under the Florida Constitution. A copy of the initial complaint is reproduced in Appendix "A". As evidenced by paragraph 14 of the complaint, Petitioners' claim was clearly brought under

Article X, Section 6, of the Florida Constitution, the takings provision of the Florida Constitution. Nowhere in Petitioners' complaint is reference made to either the Fifth or Fourteenth Amendments to the United States Constitution or to 42 U.S.C. § 1983 which is the procedural mechanism for asserting a federal takings claim. *See Bannum, Inc. v. City of Ft. Lauderdale*, 901 F.2d 989, 997 (11th Cir. 1990) (§ 1983 provides no substantive rights, it is simply a procedural mechanism by which to raise substantive federal rights).

Further, in initially determining in *Sarasota-Manatee Airport Authority v. Icard*, 567 So. 2d 937 (Fla. 2d DCA 1990), *rev. denied*, 576 So. 2d 288 (Fla. 1991) (*Icard I*), that the trial court had erred in granting partial summary judgment because there was a factual dispute as to market value damage, the Florida Second District Court of Appeal did not cite to any federal cases in its opinion. See Petitioners' appendix "G". Rather, the appellate court held that the trial court was in error based on that court's previous decision in *Fields v. Sarasota-Manatee Airport Authority*, 512 So. 2d 961 (Fla. 2d DCA 1987), *rev. denied*, 520 So. 2d 584 (Fla. 1988). The appellate court's reliance on *Fields* and its subsequent affirmance of the final judgment with citation to the *Fields* decision (Petitioners' appendix "A") leaves little doubt that no federal claim was presented in this case which would provide this Court with jurisdiction.[1] This is so because as the

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[1] It is interesting to note that this case was, in fact, abated at the trial court level until a final resolution of the issues addressed in *Fields*. A copy of the order of abatement is attached hereto as Appendix "B".

Eleventh Circuit Court of Appeals has recognized, no federal claim had been presented to the state court in *Fields*.[2] *Fields v. Sarasota-Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992). In particular, the Eleventh Circuit noted:

> [T]hat the homeowners did not raise their Fourteenth and Fifth Amendment claims in their state court complaint. Neither the Florida trial court nor Florida appellate court relied on federal takings cases to decide what the homeowners had to establish in order to show that they were entitled to compensation for the taking. (Citations omitted). Thus, the district court's finding the Florida courts considered and decided the homeowner's federal claim, *Fields*, 755 F.Supp. at 381, was clearly erroneous.

Id. at 1307 n.9.

Consequently, it is difficult to comprehend how Petitioners can argue that a federal question was decided at the state court level when no federal claim was raised in the pleadings and when the sole decision relied upon by Florida's Second District was one in which *only* a state takings claim was raised and decided. It is clear that the only issue addressed by the state court in this case was a state takings claim under the Florida Constitution and,

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[2] As noted in Respondent's Statement of Case, following their defeat in state court the *Fields* plaintiffs brought a federal taking claim pursuant to 42 U.S.C. § 1983 in federal district court which was similarly unsuccessful. *Fields v. Sarasota-Manatee Airport Authority*, 755 F.Supp. 377 (M.D. Fla. 1991), *aff'd*, 953 F.2d 1299 (11th Cir. 1992).

therefore, no jurisdiction exists for this Court to grant a writ of certiorari.

Notwithstanding their failure to ever raise a federal claim, Petitioners argue in their Petition for Writ of Certiorari that, because they did raise and argue decisions by this Court concerning Fifth Amendment takings throughout the state court proceedings, a federal question exists. First, Petitioners cite no case law to support their position that a federal question arises merely by a party's mentioning decisions of this Court. Second, Petitioners fail to point out that they raised these cases in connection with the Florida Supreme Court's decision in *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Associations, Ltd.*, 493 So. 2d 417 (Fla. 1986), in which the Florida Supreme Court effectively adopted this Court's decision in *Loretto* as applicable to a state takings analysis under the Florida Constitution.

Therefore, although this Court's decisions were cited by the Petitioners in their arguments to the state courts, these cases were argued not in support of a federal takings claim, but rather, for a state takings claim brought pursuant to the Florida Constitution. Petitioners' reference to federal takings cases in this context does not raise a federal question and bestow jurisdiction on this Court.

Finally, Petitioners fail to explain in their petition how a decision by a state appellate court which merely affirms a trial court judgment by citing to a previous decision of that court can either raise a federal question or conflict with a decision of this Court. Such an affirmance without written opinion has no precedential value and that is the precise reason the Florida Supreme Court

dismissed the petition for review. See *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So. 2d 1369 (Fla. 1980), and Exhibit "F" to Petitioners' appendix. Without a written opinion and without precedential value, it is difficult to perceive how a Florida court's decision could set forth an important federal issue or cause a conflict of decisions which mandates critical review under this Court's extraordinary jurisdiction.

In effect, Petitioners are asking this Court to review the Second District's prior decisions in *Fields* and *Icard I*, and not the affirmance with citation upon which they base their petition. The opportunities to review those earlier decisions have lapsed. If Petitioners truly believed a federal question was involved in this case, they should have appealed the state court's decision in *Icard I* to this Court. See *Nassau Power Corp. v. Beard*, 601 So. 2d 1175, 1178 (Fla. 1992) ("Under established principles of appellate review, a party must appeal the order in controversy, not a subsequent order that merely reiterates established precedent"). The failure to do so demonstrates that no federal question was implicated in the state court proceedings and, thus, no basis for review by certiorari exists for this Court.

B. ASSUMING, ARGUENDO, THAT A FEDERAL QUESTION WAS PRESENTED TO THE STATE COURT, THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE AIRCRAFT OVERFLIGHTS ARE NOT PERMANENT PHYSICAL OCCUPATIONS PURSUANT TO THE CATEGORIES ESTABLISHED BY THIS COURT IN *LORETTO* AND PROOF OF MARKET VALUE DAMAGE IS A PREREQUISITE TO THE FINDING OF A TAKING IN AIRPORT INVERSE CONDEMNATION CASES.

Interestingly, the Florida Supreme Court denied review of the *Icard I* decision notwithstanding Petitioners' assertion that the opinion expressly and directly conflicted with its prior decision in *Storer*. Petitioners' theory that aircraft overflights are per se takings was rejected both by the Second District Court of Appeal and the Florida Supreme Court because such "invasions" are not permanent physical occupations pursuant to this Court's categorization in *Loretto* and the Florida Supreme Court's subsequent holding in *Storer*. Rather, aircraft overflights are temporary physical *invasions* which require a balancing of interests, including a determination of market value impact, before they can rise to the level of a taking.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed. 2d 868 (1982), this Court established the test for determining whether a governmental activity amounts to a per se taking. The Court held that governmental action which amounts to a "permanent physical *occupation*" is a taking without regard to other factors such as economic impact on the property. *Id.*, 102 S.Ct. at 3176 (emphasis added). Once an activity is classified as a permanent physical occupation, a taking

will be found. However, the Court noted that "not every physical *invasion* is a taking." *Id.*, 102 S.Ct. at 3176 n.12 (emphasis in original). The distinctive characteristic of a physical *occupation*, i.e., a per se taking, is its permanence and absolute exclusivity. *Id.* Invasions which do not rise to the level of a permanent physical occupation are "subject to a more complex balancing process to determine whether they are a taking." *Id.* These are the "invasions" which the Court referred to as "physical invasions short of an occupation," i.e., temporary physical invasions. *Id.*, 102 S.Ct. at 3173. Notwithstanding this clear distinction, Petitioners continue to assert that direct aircraft overflights are, categorically, permanent physical occupations that require no proof of market value impact for the finding of a taking. This argument ignores both the English language and the rationale of *Loretto*.

In *Loretto* this court noted that "whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." *Id.*, 102 S.Ct. at 3177. Aircraft overflights are obviously not "permanent physical occupations" because, by their very nature, the invasions are temporary and intermittent. Petitioners' efforts to categorize overflights as "permanent occupations" does not change that reality.

Further, Petitioners' argument ignores the facts of *Loretto*. The taking in *Loretto* resulted from "a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall." *Id.* There was a permanent physical occupation of a

small, but clearly defined, portion of the plaintiffs' property. If plaintiffs' property were worth $10.00 per square foot, and only one square foot of the property were rendered unusable by attachment of the wires, etc., it is an easy mathematical calculation to conclude that plaintiffs have had $10.00 in property taken from them. The point in *Loretto* is not that a decrease in property value is irrelevant when there is a permanent physical occupation by a governmental entity, but that economic damage clearly results when even a small portion of one's property is permanently appropriated by the government. This is clearly not the case with aircraft overflights.

Nevertheless, Petitioners argue that the majority opinion in *Loretto* specifically identifies the aircraft overflights in *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) as permanent physical occupations. Petitioners are mistaken in their reading of *Loretto*. Justice Marshall, writing for the majority, cites to *Causby* in distinguishing between "a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of the property." *Loretto*, 102 S.Ct. at 3173. The opinion makes no clear statement as to which of these categories *Causby* represents. The dissenting opinion in *Loretto*, however, leaves little doubt that, on the test established by the majority opinion, *Causby* was a "temporary invasion" which required a balancing of interest, and not a taking per se. Justice Blackmun explained:

> Moreover, precedents record numerous other 'temporary' officially authorized invasions by third parties that have intruded into an owner's enjoyment of property far more deeply than did

> Teleprompter's long-unnoticed cable. See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed. 2d 741 (1980) (leafletting and demonstrating in busy shopping center); *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979) (public easement of passage to private pond)[3]; *U.S. v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) (noisy airplane flights over private land). While, under the Court's balancing test, some of these "temporary invasions" have been found to be takings, the Court has subjected none of them to the inflexible per se rule now adapted to analyze the far less obtrusive "occupation" at issue in the present case. Cf. *ante*, at 3173, 3174-3176.

Loretto, 102 S.Ct. at 3184 (Blackmun, J., dissenting).

Petitioners attempt to tailor the elements of a cause of action for de facto taking of an avigation easement by a loose interpretation of *Causby*. At page 10 of their petition, Petitioners claim, without any citation to the text of *Causby*, that the following are the elements of a de facto taking:

1. Direct overflights of private land.
2. At low altitude.
3. With frequency.
4. Causing a direct and immediate interference with the enjoyment and use of the land.

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[3] In *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987), this Court recategorized the requiring of a public easement of passage on private land as a permanent physical occupation.

Petitioners' petition at page 10. Petitioners conclude that "Market Loss was not, in itself, segregated as an element to this cause of action." Petitioners' petition at 10.

Petitioners' creative reading of *Causby* totally ignores numerous statements by this Court concerning the importance of market value loss in airport inverse condemnation cases. In *Causby* the Court initially noted:

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe . . . But that general principle does not control the present case. For the United States conceded on oral argument that if the flights over respondents' property rendered it unhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. (Citation omitted). *Market value fairly determined is the normal measure of the recovery.*

Causby, 66 S.Ct. at 1065-1066 (emphasis added).

The Court also noted that "the use of the airspace immediately above the land would limit the utility of the land and *cause a diminution in its value.*" *Id.*, 66 S.Ct. at 1066 (emphasis added). The Court clearly recognized the essential role of a market value inquiry in determining how low and frequent flights must be and how much the flights must interfere with the enjoyment and use of the land before a taking can be found:

> Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings

> of the Court of Claims plainly establish that *there was diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause.*

Id., 66 S.Ct. at 1068 (emphasis added).

Contrary to Petitioners' contention, nothing in this court's recent decision in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed 2d 798 (1992), abrogates the well-established role of market value in aircraft overflight cases. *Lucas* itself solely addressed the issue of regulatory takings and made plain that a market value analysis was the preeminent concern; the plaintiff was required to prove that the government's regulation "denied him economically beneficial use of his land." *Id.*, 112 S.Ct. at 2893 n.6. Moreover, the court's sole citation to *Causby* was to a portion and footnote of the *Causby* opinion which addressed the hypothetical construction of a cable or bridge over a landowner's property – clearly a permanent physical occupation of airspace – and not to the temporary intermittent invasion of airspace present in *Causby* and here. *Id.*, 112 S.Ct. at 2893 citing *United States v. Causby*, 328 U.S. 256, 265 and n.10, 66 S.Ct. 1062, 1067, and n.10, 90 L. Ed. 1206 (1946). Thus, the one line citation of *Causby* found in the *Lucas* opinion cannot fairly be read to have reversed years of this court's takings precedent by making *any* aircraft overflight a per se taking.

Similarly, in interpreting their own constitutional taking provision, Florida courts have consistently recognized the important role market value plays in an aircraft overflight taking analysis. See *Fields*, 512 So. 2d 961. Indeed, Florida's First District Court of Appeal in *Foster*

v. City of Gainesville, 579 So. 2d 774 (Fla. 1st DCA 1991), specifically cited this Court's decisions in *Causby* and *Griggs v. County of Allegheny*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed. 2d 585 (1962) as holding that a landowner must demonstrate a diminution in value of their properties in order to obtain relief in inverse condemnation. *Foster*, 579 So. 2d at 776-777. The court in *Foster* recognized that the property owner in an inverse condemnation action "seeks no recovery for his individual suffering, damage, loss of quiet, or other disturbance; rather, recovery is based upon the injury to the market value of the property." *Id.*, 579 So. 2d at 777 n.3, citing *Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989, 85 S.Ct. 701, 13 L.Ed. 2d 610 (1965).

For this reason, courts have uniformly held that proof of substantial market value damage is a prerequisite to relief in an airport inverse condemnation claim. See also *Alevizos v. Metropolitan Airport Commission*, 216 N.W.2d 651 (Minn. 1974). Undaunted by the Florida courts' rejection of their theory that direct aircraft overflights are per se takings which require no proof of market value damage, Petitioners raise this same argument in an effort to overcome their failure to prove the essential element of an inverse condemnation case, market value damage. Petitioners' attempt to sidestep this requirement is unavailing and their petition for writ of certiorari should be denied.

VI. CONCLUSION

For the foregoing reasons, the writ of certiorari to the District Court of Appeal of Florida, Second District, should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE
12th JUDICIAL CIRCUIT IN AND
FOR MANATEE COUNTY, FLORIDA

CASE NO. CA-84-2630

THOMAS F. ICARD, as Trustee, J. PAUL ICARD, as Trustee, THOMAS F. ICARD, as Trustee, THOMAS F. ICARD, and GENE S. ICARD,

Plaintiffs,

vs.

SARASOTA-MANATEE AIRPORT AUTHORITY, a body politic and corporate,

Defendant.

_____/

COMPLAINT

Plaintiffs, THOMAS F. ICARD, as Trustee, as to Sara-Bay II, and J. PAUL ICARD, as Trustee, THOMAS F. ICARD, as Trustee, THOMAS F. ICARD, and GENE S. ICARD, as to the multi-family parcel described below, sue the Defendant, SARASOTA-MANATEE AIRPORT AUTHORITY, and allege that:

1. The Plaintiffs, as listed above, are *sui juris* and are the fee owners of multi-family residential properties, more particularly described as:

A. A multi-family property, described in Exhibit A attached and incorporated by reference herein, containing 37 acres, more or less; and

B. *Sara-Bay II*: a parcel of land situate in Sec. 26 and 27, Twp. 35 S., Rge. 17 E., Manatee County, Florida and being more particularly bounded and described as follows:

Commence at the N.W. corner of said Section 26; thence N 89°48'47" E along the N line of said Sec. 26 238'; thence S 0°17'47" W along the E line of SaraBay Coves, a Condominium, recorded in Condominium Book 3 at Page 77-81 of the Public Records of Manatee County, Florida 638.29' for a POB; thence S 35°09'39" W 644.54'; thence N 54°49'45" W 180.64'± to the Mean High Water line of Sarasota Bay; thence NE'ly along said Mean High Water line 445'± to said SaraBay Coves; thence along said SaraBay Coves the following four (4) courses: S 54°49'09" E 135.10'±; N 35°10'51" E 141.22'; N 0°17'47" E 20.14' and S 89°42'13" E 75' to the POB.

Containing 2.00 acres of land, more or less.

2. The Defendant, Sarasota-Manatee Airport Authority, owns, operates and maintains the Sarasota-Bradenton Airport, located adjacent to U.S. 41 extending over both the Sarasota and Manatee County lines. The Defendant is empowered by Chapter 31263 of the Laws of Florida to sue and be sued in its own name and to plead and be impleaded. The Act further authorizes the Defendant (Airport Authority) to:

> acquire, by gift, purchase or the exercise of eminent domain, any land or *rights in land* deemed necessary in connection with the improvement or operation of its "airport facilities." "Airport facilities" is defined, in part, as "all properties rights, *easements*, and franchises relating thereto."

3. This Court has jurisdiction pursuant to Article V, Section 5, Florida Constitution (1968); Section 26.012, Florida Statutes (1983); Chapters 73 and 74, Florida Statutes (1983); and Section 333.12, Florida Statutes (1983).

INVERSE CONDEMNATION

4. The Defendant, Airport Authority, has, in the proper exercise of its powers, contracted with various commercial airlines for the use and operation of the Sarasota-Bradenton Airport facilities (Airport). Such use and operation includes the right of the airlines to take-off and to land jet and jet-prop aircraft from and on the runways constructed and maintained by the Defendant.

5. From 1970 to 1975 many construction projects took place at the Airport, including the extension and improvement of the main runway, 13-31.

6. Before the expansion and improvement of the airport to its present capacity, the land in the vicinity of the airport, including the Plaintiffs' properties, were zoned and used for residential purposes. Title and/or Beneficiaries' interest in Plaintiffs' property has been continually in Plaintiffs' family, with the exception of Sara Bay II parcel, since before the Sarasota-Bradenton airport was built.

7. In the early and mid-1970's, air traffic levels fluctuated at the airport. Beginning in 1978, however, an unabated, dramatic increase in air traffic has occurred, primarily due to the awarding of multiple routes and airline de-regulation. The nearly trebled increase in commercial airline traffic between 1978 and 1983 has caused a

substantial, qualitative change in the nature of the Sarasota-Bradenton Airport.

8. The continued expansion of the facilities and traffic at the Airport has had a serious impact upon the surrounding residential properties, including that of the Plaintiffs, which are in the path or vicinity of runway 13-31, and its approach areas. Runway 13-31 accounts for over ninety-eight (98%) percent of commercial airline traffic at the airport.

9. The approach areas to the airport runways are designated by State and Federal law. These approach areas extend over or adjacent to the Plaintiffs' properties, down to an extremely low altitude. The increased demand on the approach areas has caused an undue burden to be placed upon the residential land of the Plaintiffs. Such burden of low-altitude flights has ripened into a servitude or easement-in-fact over the lands of the Plaintiffs, as well as severance damages to Plaintiffs' remaining lands. Without the approach areas, the Airport is not operable. Therefore the continued use and operation of the airport facility requires the continued servitude over and on the Plaintiffs' lands.

10. In addition to the actual approach area use, the jet and jet-prop aircraft propagate a noise so severe and deleterious that the appropriate State and Federal health and safety agencies have issued strict guidelines concerning land use compatibility within certain noise impact zones. The impact of this throbbing, piercing noise has further created a servitude or easement-in-fact over the residential properties of the Plaintiffs; as well as severance damages to Plaintiffs' remaining land.

11. The nationally recognized, best available technology in land use planning near airports has designated a hazard area in close proximity to major airport runways. These hazard areas are the most likely zones for catastrophe in the event of human, mechanical, or weather-related aircraft crashes. The Plaintiffs' properties are in the zone which are, or should have been, designated as especially hazardous due to the aircraft operations for which the Defendant is legally responsible. Again, this hazard zone creates a burden on and over the Plaintiffs' lands amounting to an easement-in-fact, as well as severance damages to Plaintiffs' remaining lands.

12 In addition to the low altitude flights within and adjacent to the approach areas over and next to the Plaintiffs' properties, during both day and night, the severe noise impact, and the inclusion of the Plaintiffs into a hazard zone, (all against the will and permission of the Plaintiffs), the Defendant has also substantially deprived the Plaintiffs of the residential use of their properties in one or more of the following means:

a. vibrations;

b. fear and anxiety;

c. disruption of conversation and communication;

d. interruption of sleep;

e. fumes and residue from jet fuel – including the dumping of jet fuel;

f. the loss of the outdoor recreational use of the property.

13. All of the effects listed in paragraph 12 above have destroyed the residential use and character of the Plaintiffs' properties. Such destruction has resulted in, among other things, a marked, substantial decrease in the market value of the Plaintiffs' properties, and has made necessary extraordinary and costly sound-proofing of any new residences built on Plaintiffs' properties, if in law any new residences are permitted.

During the years 1978 to date, there has been no evidence of any relief to the continuously accelerating and worsening conditions.

14. As a direct and proximate result of the increased operation of jet and jet-prop aircraft to and from Defendant's airport, the Defendant has substantially deprived the Plaintiffs of the free and unmolested use and quiet enjoyment of their properties. The Defendant has, by the improvement and expansion of its airport facilities, exercised dominion and control over, appropriated, confiscated and condemned an avigation easement – over the properties of the Plaintiffs, without full compensation, and without due process of law, contrary to Article I, Section 9; Article II, Section 7; and Article X, Section 6, *Florida Constitution* (1968); as well as existing applicable statutory laws.

WHEREFORE, Plaintiffs seek this Court's protection in issuance of an Order of Taking, which determines that the Defendant has taken avigation easements in and caused severance damages to Plaintiffs' properties, at a certain time; describes the estates acquired; and sets a jury trial to determine the full compensation to be awarded the Plaintiffs pursuant to Chapters 73 and 74,

Florida Statutes (1983). Plaintiffs seek a further Order of Court requiring the Defendant to pay to the Plaintiffs all reasonable attorneys fees and costs necessarily incurred as a result of Defendant's course of conduct, as well as an Order setting the applicable prejudgment interest due to these Plaintiffs.

BRIGHAM MOORE MUIR GAYLORD
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Post Office Drawer 428
Sarasota, Florida 33578
(813) 365-3800
Attorneys for Plaintiffs

/s/ S. W. Moore
S. W. Moore

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail to RUSS KOSS, ESQUIRE, Post Office Box 3258, Sarasota, Florida 33578, Attorney for Defendant, this 27 day of November, 1984.

/s/ S. W. Moore
S. W. Moore

A tract of land lying in Sections 26 and 27, together with an island lying in Section 27, all in Township 35 South, Range 17 East, Manatee County, Florida, described as follows:

Commence at a capped iron rod set at the Northwest corner of said Section 26, (the following 6 calls are along

the lines of Sarabay Coves, a Condominium and its recreation area, recorded in Condominium Book 3, Pages 77 through 81 of the Public Records of Manatee County, Florida); thence N89°52'01"E a distance of 238.00 feet for the POINT OF BEGINNING: thence S00°17'47"W a distance of 638.07 feet; thence N89°42'13" W a distance of 75.00 feet; thence S00°17'47"W a distance of 20.14 feet; thence S35°10'51"W a distance of 141.22 feet; thence N54°49'09"W a distance of 135 feet more or less to the mean high water of Sarasota Bay; thence Southwesterly along said mean high water line a distance of 900 feet more or less to the beginning of an island in said Sarasota Bay; thence Southwesterly 140 feet more or less, Northwesterly 200 feet more or less, Southwesterly 830 feet more or less, Southeasterly 270 feet more or less, Northeasterly 380 feet more or less, Southeasterly 370 feet more or less, Northwesterly 620 feet more or less and Northeasterly 210 feet more or less along the mean high water line surrounding said island to a point on the mainland lying 60 feet, more or less, Southeasterly of the beginning of the previously described island; thence Southeasterly, Easterly and Northeasterly along said mean high water line a distance of 1240 feet more or less to its intersection with the common line between Lots 18 and 19, Block "J", Emerald Isles, Unit No. 1, Sheet #2, as recorded in Plat Book 4, Page 90, of the aforementioned Public Records (vacated); thence N24°05'05"E a distance of 163.0 feet; thence N00°06'57"E a distance of 1140.00 feet to a wood post marking the common corner of Lots 10, 11 and 12, Block "E" of said Emerald Isles Subdivision; thence continuing N00°06'57"E a distance of 373.05 feet to the Northerly line of the Northwest 1/4 of said Section 26; thence

S89°48'47"W along said Northerly line a distance of 563.65 feet to a point which lies 238.00 feet N89°48'47" E of the Northwest corner of said Section 26; thence S00°17'47"W a distance of 0.22 feet to the POINT OF BEGINNING, containing 40 acres more or less,

LESS that part of the following described property which lies within the above-described property:

Begin at the Northwest corner of Section 26, Township 35 South, Range 17 East; thence N89°52'01"E along the North line of said Section 26, 673.25 feet for a POINT OF BEGINNING: thence continue N89°52'01"E, 591.55 feet; thence S00°07'59"E to the Northwest corner of that certain triangular shaped parcel of land deeded to the State of Florida, as recorded in Deed Book 373, Page 161, Public Records of Manatee County, Florida; thence S34°58'06"E along the Southwesterly line of said parcel 19.32 feet to the intersection of said line and the West R/W of Tamiami Trail, as set forth in the Plat of Emerald Isles Subdivision, Unit No. 1, Sheet #1, as recorded in Plat Blook 4, Page 90, Public Records of Manatee County, Florida; thence S03°02'49"E along said West R/W, 234.45 feet; thence S89°51'11"W, parallel to the South line of Block "E" of said Emerald Isles Subdivision and 100.0 feet therefrom, 194.93 feet; thence S00°08'49"E, 100.0 feet to the intersection of said line and the South line of said Block "E"; thence S89°51'11"W along the South line of said Block "E" and Westerly extension thereof, 419.60 feet; thence N00°07'59"W, perpendicular to the North line of said Section 26, 375.16 feet to the POINT OF BEGINNING, being and lying in Section 26, Township 35 South, Range 17 East, Manatee County, Florida. Containing 5.0 acres, more or less,

AND LESS the following described property:

A tract of land lying in Sections 26 and 27, Township 35 South, Range 17 East, Manatee County, Florida described as follows:

Commence at a capped iron rod set at the Northwest corner of said Section 26 (the following 2 calls are along the lines of Sarabay Coves, a Condominium recorded in Condominium Book 3, Pages 77 through 81 of the Public Records of Manatee County, Florida); thence N89°52'01"E a distance of 238.00 feet; thence S00°17'47"W a distance of 638.07 feet to the POINT of BEGINNING; thence S35°09'39"W a distance of 644.54 feet to a concrete monument found; thence N54°49'45"W a distance of 180 feet, more or less, to the Mean High Water of Sarasota Bay (passing through a concrete monument found at 170.64 feet); thence Northeasterly along said Mean High Water Line a distance of 445 feet, more or less, to its intersection with the Southerly line of the Recreation Area shown on the aforementioned Plat of Sarabay Coves Condominium (the following 4 calls are along the lines of said Recreation Area and said Sarabay Coves Condominium); thence S54°49'09"E a distance of 135 feet, more or less; thence N35°10'51"E a distance of 141.22 feet; thence N00°17'47"E a distance of 20.14 feet; thence S89°42'13"E a distance of 75.00 feet to the POINT OF BEGINNING, containing 2 acres, more or less.

EXHIBIT "A"

APPENDIX B

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT, IN AND FOR MANATEE COUNTY, FLORIDA.

Civil Action

THOMAS F. ICARD, as Trustee, et al.,

Plaintiffs,

CASE NO. CA-84-2630

vs

SARASOTA-MANATEE AIRPORT AUTHORITY, a body politic and corporate,

Defendant.

ORDER OF ABATEMENT

(Filed Sept. 16, 1986)

THIS CAUSE coming before the Court upon Joint Motion of the parties, the Court having considered the matter, and having been advised by counsel, it is therefore,

ORDERED that this cause is hereby abated until all appeals have been resolved in the current litigation of Fields vs. Sarasota-Manatee Airport Authority, Case No. CA-84-2379. When all appellate proceedings have been resolved in the Fields action, this cause will cease to be abated and be ready to be set for trial upon Motion of the parties.

DONE and ORDERED in Chambers at Sarasota County, Florida, this the 11 day of September, 1986.

/s/ James S. Parker
CIRCUIT JUDGE

Copies to:

Steve Hutton, Esquire
S. W. Moore, Esquire
Clerk of Circuit Court